**83-641**

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No. ..-....
IN THE

# Supreme Court of the United States

October Term, 1983

BRISTOL CORPORATION, dba FEY MANUFACTURING CORPORATION,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## Question Presented.

Is an automobile which is used primarily for carrying passengers and designed primarily as a passenger-carrying vehicle a "passenger automobile" for purposes of the federal excise tax laws?

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UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

### Opinions Below.

The District Court entered Judgment for Petitioner on January 21, 1982 (Appendix p. 8), following a bifurcated trial. The first portion of the trial related to the issues here involved. A Memorandum of Decision (Appendix p. 1) was rendered on May 22, 1980. It was not officially reported, but is reported at 81-2 CCH U.S. Tax Cases ¶16,366. A second hearing was held on the issue of whether the tax was "passed-on" or borne by Bristol. An unreported Memorandum of Decision in favor of Bristol was rendered on December 8, 1981 (Appendix p. 7). Judgment for Bristol was reversed *per curiam* by the Ninth Circuit on July 26, 1983 (Appendix p. 9) (Unofficially reported at 83-1 CCH U.S. Tax Cases ¶16,406).

**Jurisdiction.**

The Court of Appeals for the Ninth Circuit entered judgment reversing the District Court on July 26, 1983, and neither party sought rehearing. This Court's jurisdiction is based on 28 U.S.C. §1254(1).

**Statutory Provisions.**

The full text of the relevant statutory provisions are set forth at Appendix p. 19. They can be summarized succinctly:

Section 4061(b)(1) of the Internal Revenue Code imposes an 8% tax on sales of automobile parts or accessories for trucks, except as provided in subparagraph (2).

The exception of 4061(b)(2) is the focal point of this case. As relevant, it reads:

> "(2). No tax shall be imposed . . . upon any part or accessory which is suitable for use (and ordinarily is used) on . . . a *passenger automobile* . . ." [Emphasis added]

**Statement of Case.**

Petitioner Bristol is a small, independent manufacturer of automobile bumpers. Bristol's bumpers are sold to new car dealers for the installation on new pick-ups, vans and Jeeps, in competition with the bumpers offered by the automobile manufacturers. Although the giant manufacturers such as G.M., Ford and Chrysler are exempt from the excise tax on their sales of bumpers to this market, a tax was assessed against Bristol on its sales. This action was instituted by Bristol in the Federal courts pursuant to 28 U.S.C. 1346(a)(1) to obtain a refund of the excise taxes which it paid on its sales of automobile bumpers.

Bristol's position at trial was that the pick-ups, vans and Jeeps to which its bumpers were attached were "passenger automobiles", so that the exemption under 4061(b)(2) ap-

plied. This issue was the subject of a four day trial, during which extensive evidence was introduced as to the design and the use of the automobiles to which Bristol's bumpers were attached.

At the conclusion of this trial the District Court Judge ruled that the bumpers sold by Bristol were attached to automobiles which were primarily used as passenger vehicles and which were primarily designed for use as passenger vehicles. The District Court accordingly found as an ultimate fact that the autos were "passenger automobiles", so that the sales were exempt.

The Respondent has not questioned any of these findings. Instead, on its appeal to the Ninth Circuit Respondent asserted that the Legislative History of Section 4061 established as a matter of law that *no* automobile called a "pick-up" could be classified as a "passenger automobile" *even though* it was primarily designed and primarily used for the transportation of passengers.

The Ninth Circuit, in a case involving the application of 4061(b)(2) to a different taxpayer [*Luben Industries, Inc. v. United States*, ___ F.2d ___ (9th Cir. 1983) 83-1 CCH U.S. Tax Cases ¶16,400] (reproduced at Appendix p. 10), accepted this argument and concluded that pick-ups could never be passenger automobiles. *Luben* was decided after submission of *Bristol*, so Bristol had no opportunity to challenge its holding. In *Bristol* the Ninth Circuit summarily disposed of the judgment reached after a full trial on the merits with a *per curiam* reversal, citing *Luben*.

## REASONS FOR GRANTING THE WRIT.

Certiorari should issue in this case because the decision of the Ninth Circuit ignores long-standing principles of construction of the tax laws to reach a result that is grossly discriminatory against small independent automobile parts manufacturers such as Bristol.

### 1. The Decision of the Ninth Circuit Leads to a Clearly Discriminatory Construction of the Excise Tax Law Which Must Fly in the Face of Any Congressional Intention.

The *Bristol* case is of enormous importance to the many independent manufacturers of automobile parts who compete with the giant automobile manufacturers in selling their products into the automobile market. The task is a formidable one. The manufacturers have the built-in advantage of a strong dealer network under significant economic compulsion to deal in parts offered by the chassis manufacturers. To compete, the independents must offer a better product at a lower price.

The District Court found that the bumpers sold by the giant manufacturers were exempt from tax. In addition, the District Court found that the tax on Bristol's sales of bumpers could not be "passed on" to its customers because of the competitive market created by the giant manufacturers. The burden of the tax was found to have been borne by Bristol. The Government has conceded this ruling.

Thus, viewed from the economic world in which Bristol and the other independent manufacturers battle for their existence the issue is whether Congress adopted an excise tax law which exempts G.M., Ford and Chrysler, but taxes Bristol and the other independents on their sales of identical parts.

To suggest such a conclusion is to command the answer. And yet, the Ninth Circuit by its decision has brought about just such a construction of the tax law. That construction is wrong, and it is potentially catastrophic to those small companies which have struggled to compete in this difficult market. Justice demands that these taxpayers be given the opportunity to establish that the particular market within which they operated is one as to which the exemption of Section 4061(b) is applicable.

**2. The Decision of the Ninth Circuit Is Contrary to the Long-Established Rule of the Supreme Court That in Interpreting Tax Statutes the Meaning of Words of General Import Is a Question of Fact.**

Under long-standing decisions of this Court the question of whether the vehicles to which Bristol's bumpers were attached are "passenger automobiles" is clearly one of fact. *Universal Battery Co. v. U.S.*, 281 U.S. 580, 50 S.Ct. 422, 74 L.Ed. 1051 (1930) (excise tax, classification of items as "automobile parts" is one of fact); *American Chain Co. Inc. v. Eaton*, 291 U.S. 386, 5 S.Ct. 443 (1934), revg. 63 F.2d 983 (2d Cir. 1933), see subsequent opinion 86 F.2d 105 (2d Cir. 1936); *Aran v. United States*, 259 F.2d 757 (9th Cir. 1958) (whether bottle warmer operated from cigarette lighter is an "automobile part or accessory" is question of fact); *King Trailer Co. Inc. v. U.S.* (S.D. Cal. 1964) 228 F.Supp. 1013, *aff'd.* 350 F.2d 947 (9th Cir. 1965) (whether camper coach was an "automobile part" for excise tax purposes is a question of fact); *Budge Mfg. Co. Inc. v. United States*, 280 F.2d 414 (3rd Cir. 1960) (same); see also *Com'r v. Duberstein*, 363 U.S. 278, 80 S.Ct. 1190, 4 L.Ed.2d 1281 (1960).

The question of whether a pick-up is a "passenger automobile" is a question of fact. In *Aetna Life Insurance Co.*

*v. Bidwell*, 241 S.W.2d 595 (Tenn. 1951), the Supreme Court of Tennessee concluded that a one-half ton pick-up was "a passenger automobile of the pleasure car type" within the meaning of an insurance policy. The Ninth Circuit reached a similar conclusion in *Fidelity & Casualty Co. of New York v. Martin*, 66 F.2d 438 (9th Cir. 1933). It has been followed by other Courts. *See, e.g., Mutual Benefit Health and Accident Association v. Hudman*, 385 S.W.2d 509 (1964).

The Internal Revenue Service has consistently ruled that a vehicle primarily designed and used for the transportation of passengers is a "passenger automobile". [Rev. Rul. 66-308 (1966-2 Cum. Bull. 467); Rev. Rul. 68-571 (1968-2 Cum. Bull. 498); and numerous private rulings, including 7750062, 7823070, 7848022 and 8051055].

In overriding these long settled rules the Ninth Circuit establishes as a matter of law that no automobile called a "pick-up" can possibly be a passenger automobile. Its only support for this position is a reference to Legislative History that is never quoted. The reason for this omission is simple: The Legislative History never uses the word "pick-up". There is nothing in the Legislative History offering a word of guidance as to whether pick-ups are to be classified as "trucks" or as "passenger automobiles".

We do not argue here that all pick-ups are necessarily "passenger automobiles." That would be as wrong as the Government's contention that all pick-ups are necessarily "trucks". The rule required by the decisions of this Court is that the classification of an automobile as a "passenger automobile" or "truck" is a question of fact that depends on its use and design.

**Conclusion.**

Petitioner respectfully submits that a Writ of Certiorari should issue and that the decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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*Of Counsel:*

ARMSTRONG, HENDLER & HIRSCH,

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## APPENDIX

### Memorandum of Opinion.

United States District Court, Central District of California.

Bristol Corporation, dba Fey Manufacturing Corporation, Plaintiff, vs. United States of America, Defendant. Civil No. 78-1759-HP.

Filed: May 22, 1980.

This tax refund case requires the court to determine whether I.R.C. § 4061(b)(1), the 8% federal excise tax on truck parts and accessories, applies to steel towing bumpers manufactured by plaintiff Bristol Corporation. Bristol seeks a refund of quarterly manufacturer's excise taxes paid to the United States for each of eight quarters in the years 1972 and 1973. The total amount of refund sought is $217,599.30.

A four day court trial was directed to the issue whether the towing bumpers manufactured by Bristol are tax exempt. A second critical issue — whether the excise tax was passed on to the consumer — was reserved for trial at a later date.

Having considered the pleadings and memoranda filed by the parties, the testimony and other evidence presented at trial, and the oral argument of counsel, the court concludes that the towing bumpers manufactured by Bristol fall within the excise tax exemption set forth in I.R.C. § 4061(b)(2).

Plaintiff Bristol Corporation, successor in interest to Fey Manufacturing Corporation, manufactures steel towing bumpers designed for use on the rear of light-duty pick-ups, vans, and recreational vehicles. The bumpers are, for the most part, sold to retail truck dealers for installation on new light-duty pick-ups that invariably arrive from the factory without bumpers. A purchaser usually orders a towing bumper that suits his or her needs through the retail dealer at the time the pick-up is ordered. The dealer then purchases the bumper either from the vehicle's manufacturer or from

an independent bumper manufacturer such as Bristol.[1] Before delivery of the new pick-up to the customer, the bumper is installed by the dealer. Between January 1, 1972 and December 31, 1973, 90 to 95% of the bumpers manufactured and sold by Bristol were attached to light-duty pick-ups, i.e., one-half and three-quarter ton pick-up trucks. Between 5 and 10% of Bristol's bumpers were attached to vans as well as recreational vehicles, such as the Ford Bronco, Chevy Blazer, and Jeep Cherokee.

I.R.C. § 4061 states:

> (a) Trucks, buses, tractors, etc.—
>
> (1) Tax imposed.—There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax of 10 percent of the price for which so sold, except that on and after October 1, 1984, the rate shall be 5 percent—
>
> Automobile truck chassis.
> Automobile truck bodies.
> Automobile bus chassis.
> Automobile bus bodies.
> Truck and bus trailer and semitrailer chassis.
> Truck and bus trailer and semitrailer bodies.
> Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer.
>
> A sale of an automobile truck, bus, truck or bus trailer or semitrailer shall, for the purposes of this subsection, be considered to be a sale of a chassis and of a body

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[1]Under the Internal Revenue Service's interpretation of § 4061, bumpers sold by vehicle manufacturers, such as General Motors, Ford, and Chrysler, are exempt from the excise tax while bumpers manufactured by small, independent manufacturers such as Bristol are subject to taxation. T.R. § 48.4061(a)-(1)(f)(2). T.D. 7461, 1977-1 C.B. 317.

enumerated in this subsection.

(2) Exclusion for light-duty trucks, etc.—The tax imposed by paragraph (1) shall not apply to a sale by the manufacturer, producer, or importer of the following articles suitable for use with a vehicle having a gross vehicle weight of 10,000 pounds or less (as determined under regulations prescribed by the Secretary)—

Automobile truck chassis.
Automobile truck bodies.
Automobile bus chassis.
Automobile bus bodies.
Truck trailer and semitrailer chassis and bodies, suitable for use with a trailer or semitrailer having a gross vehicle weight of 10,000 pounds or less (as so determined).

(b) Parts and accessories.—

(1) Except as provided in paragraph (2), there is hereby imposed upon parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a)(1) sold by the manufacturer, producer, or importer a tax equivalent to 8 percent of the price for which so sold, except that on and after October 1, 1984, the rate shall be 5 percent.

(2) No tax shall be imposed under this subsection upon any part or accessory which is suitable for use (and ordinarily is used) on or in connection with, or as a component part of, any chassis or body for a passenger automobile, any chassis or body for a trailer or semitrailer suitable for use in connection with a passenger automobile, or a house trailer.

Section 4061 is structured, then, as follows: § 4061(a)(1) taxes trucks, buses, tractors, and certain trailers; § 4061(a)(2) exempts light-duty pick-ups from that tax; § 4061(b)(1) taxes parts and accessories of those vehicles mentioned in (a)(1)—

trucks, buses, tractors, and trailers; and § 4061(b)(2) exempts parts and accessories suitable for use and ordinarily used in connection with passenger automobiles. The government concedes that plaintiff's bumpers are suitable for use and ordinarily used in connection with light-duty pick-ups, vans, and recreational vehicles. The Internal Revenue Service (I.R.S.) has previously determined that vans as well as recreational vehicles, such as the Ford Bronco, Chevy Blazer, and Jeep Cherokee, are passenger automobiles within the meaning of § 4061. Rev. Rul. 73-23, 1973-1 C.B. 428; Rev. Rul. 66-308, 1966-1 C.B. 467.[2] Thus, the only issue facing the court is whether one-half and three-quarter ton pick-ups fall within the meaning of the term "passenger automobile" as that term is used in § 4061(b)(2).

The term "passenger automobile" is nowhere defined in the applicable statutes or regulations. Nor does case law define the term in the context of § 4061. The evidence presented during trial satisfies the court that a majority of the purchasers of light-duty pick-ups buy them primarily for use as passenger vehicles, although the purchasers' attraction for the pick-ups is increased by the vehicles' cargo-carrying capacity. The evidence at trial also showed that car manufacturers, aware of consumer preferences, design their light-duty pick-ups primarily to make them attractive and comfortable for use as passenger vehicles. Accordingly, whether one looks to use or design, light-duty pick-ups can reasonably be considered passenger automobiles within the meaning of 4061(b)(2). Moreover, the I.R.S. has deter-

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[2]Although Rev. Rul. 66-308 has been declared obsolete by Rev. Rul. 72-622, 1972-2 C.B. 652, a reading of later rulings by the I.R.S. leads the court to believe that the I.R.S. still treats recreational vehicles such as the Ford Bronco, Chevy Blazer, and Jeep Cherokee as passenger automobiles. *See* Rev. Rul. 72-614, 1972-2 C.B. 549; Rev. Rul. 78-380, 1978-42 I.R.B. 55; Pvt. Let. Rul. 7842009, CCH Excise Tax Rep. ¶7609.

mined that vans without the normal complement of rear passenger seats are passenger automobiles within the meaning of § 4061(b)(2). Rev. Rul. 73-23, 1973-1 C.B. 428. That determination supports the court's conclusion that light-duty pick-ups are passenger automobiles since vans without rear seats are closely akin to the light-duty pick-ups under scrutiny in this case.

Finally, the government urges that the legislative history of § 4061 and the subsequent enactments of §§ 6416(b)(2)(K) and 4063(e) which progressively exempted parts and accessories, including bumpers, from the excise tax conclusively prove that § 4061, during the tax years in question, was intended to tax the bumpers at issue here. This argument is unpersuasive. The legislative history of § 4061 is inconclusive. Moreover, the subsequent enactments of §§ 6416(b)(2)(K) and 4063(e) do not persuade the court that Congress initially intended to tax these bumpers. Indeed, a contrary argument could plausibly be made. In rejecting a contention similar to that advanced by the government, the Ninth Circuit, in *United States v. King Trailers Co., Inc.*, 350 F.2d 947 (9th Cir. 1965), observed:

> [I]t is contended that we should infer a previous Congressional intent that the units were taxable. It is equally reasonable to speculate that the Congress, aware of the present litigation and other similar controver[sies], undertook to eliminate any doubt, however remote, that it had always intended that manufacturers of the subject articles [i.e., pick coaches], as manufacturers of house trailers, were exempt from payment of the tax.

*Id.* at 948. This court, in determining the applicability of the excise tax exemption to the towing bumpers at issue here, finds scant support for the government's position in either the legislative history of § 4061 or in the subsequent enactments of §§ 6416(b)(2)(K) and 4063(e).

In light of the foregoing, the court concludes that plaintiff's steel towing bumpers designed for use on the rear of light-duty pick-ups are exempt from the manufacturer's excise tax under the exception set forth in § 4061(b)(2).[3]

The Clerk of the Court shall serve copies of this Order, by United States mail, upon the attorneys of record for the parties appearing in this action.

Dated: May 22, 1980

/s/ Harry Pregerson
HARRY PREGERSON
United States Circuit Judge sitting
by designation

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[3]In its post-trial brief, Bristol argues for the first time that since a significant portion of its bumpers are used on vans and recreational vehicles — passenger automobiles within the meaning of § 4061(b)(2) — all bumpers sold by Bristol should then be exempt from taxation. The plain language of § 4061(b)(2) supports this argument: "No tax shall be imposed under this subsection upon any part or accessory which is suitable for use (and ordinarily is used) on or in connection with . . . a passenger automobile." In addition, Bristol cites several persuasive I.R.S. revenue rulings in support of this newly asserted argument. Bristol, however, is precluded from advancing this argument. Treasury Regulation § 301.6402-2(b) (1956) requires that a taxpayer's administrative claim set forth in detail each asserted ground for refund. Accordingly, "a taxpayer cannot recover at trial on a ground different from that asserted in his claim for refund unless there is some action by the [government] amounting to a waiver of the regulation." *Brown v. United States*, 427 F.2d 57, 62 (9th Cir. 1970). The government, however, may waive the taxpayer's compliance with the regulation by dispensing with its formal requirements, or by injecting a defense at trial different from that relied on by the government at the administrative level, thereby prompting the taxpayer to advance a new ground in response to the government's new position. *Bear Valley Mutual Water Co. v. Riddell*, 493 F.2d 948, 952 (9th Cir. 1974). Since Bristol's administrative claim did not include the ground for refund described above, and since the government has not waived compliance with the regulation, the court is precluded from considering Bristol's newly asserted ground for refund.

**Memorandum of Decision.**

United States District Court, Central District of California.

Bristol Corporation, dba Fey Manufacturing Company, Plaintiff, v. United States of America, Defendant.
No. CV 78-1759-FW.

Filed: December 8, 1981.

This action came on for trial on the issue as to whether or not plaintiff had passed on the amount of excise taxes paid by plaintiff on the manufacture of the product involved in this action. Another Judge of this Court theretofore had ruled that the product was exempt from the payment of excise taxes. Plaintiff had filed suit for refund of the amount paid by way of excise taxes on the product held to be exempt therefrom.

The Court has considered the matter and finds that the plaintiff did not pass on the excise taxes to the purchasers of the product in question from plaintiff.

To the extent that there is a conflict between the testimony of the witnesses for plaintiff and the testimony of the government, the Court considers the testimony produced by plaintiff to be more credible and more reliable.

Counsel for plaintiff is directed to prepare proposed findings of fact and conclusions of law and judgment not inconsistent therewith and to serve and lodge the same promptly.

Dated this 8th day of December, 1981.

/s/ Francis C. Whelan
FRANCIS C. WHELAN
United States District Judge

**Judgment.**

United States District Court, Central District of California.

Bristol Corporation, dba Fey Manufacturing Corporation, Plaintiff, vs. United States of America, Defendant. No. CV 78-1759-FW.

Filed: January 20, 1982.

This action came on for trial before the Court, Honorable Francis Whelan, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiff BRISTOL CORPORATION, dba FEY MANUFACTURING CORPORATION recover of the defendant UNITED STATES OF AMERICA the sum of One Hundred Ninety Two Thousand Five Hundred Forty-Six Dollars and Thirty-Five Cents ($192,546.35), with pre-judgment interest thereon as provided by law, and its costs of action.

DATED: January 21, 1982.

/s/ Francis C. Whelan,
UNITED STATES DISTRICT JUDGE
UNITED STATES DISTRICT COURT
for the Central District of California

**Order of Reversal.**

United States Court of Appeals for the Ninth Circuit.

Bristol Corporation, dba, Fey Manufacturing Company, Plaintiff-Appellee, vs. United States of America, Defendant-Appellant. No. 82-5361; D.C. No. CV 78-1759 FW.

Filed: July 26, 1983.

Appeal from the United States District Court for the Central District of California.

Harry Pregerson, Circuit Judge, Sitting by Designation.

Submitted February 7, 1983.

Before: CHAMBERS, NELSON and NORRIS, Circuit Judges.

The judgment in this case is reversed and the case is remanded for entry of judgment in favor of the Internal Revenue Service. *Luben Industries, Inc. v. United States* ___ F.2d ___ (9th Cir. June 7, 1983).

**Decision.**

[¶ 16,400] Luben Industries, Inc., Plaintiff-Appellant v. United States of America, Defendant-Appellee.

U. S. Court of Appeals, 9th Circuit, No. 81-5877, 6/7/83.

Before FLETCHER and NELSON, Circuit Judges, and East,* District Judge.

Opinions

East, Senior District Judge: In the District Court, Luben Industries, Inc. (Luben) sought to recover a refund of allegedly unlawfully assessed and collected Federal excise taxes. The Government in turn counter-claimed for allegedly lawfully assessed but unpaid excise taxes. The parties filed cross-motions for summary judgments. The District Court denied Luben's motion, granted the Government's motion, and entered its final judgment on July 30, 1981. Luben appeals. We note jurisdiction under 28 U. S. C. § 1291 and affirm.

Luben manufactured and sold accessories (roll bars, push bars and brush guards) for light-duty (½ to ¾ ton) pickup trucks. Luben considered the manufacture and sale of these accessories as *not* being subject to the manufacturer's excise tax imposed by I. R. C. § 4061 (1976)[1] On audit, the Internal Revenue Service (IRS) determined that Luben's sales were

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]I. R. C. § 4061 is composed of four parts. Section 4061(a)(1) *imposes* a 10% manufacturer's excise tax on all truck bodies and chassis (including parts and accessories sold on or with the truck). Section 4061(a)(2) *exempts* from this tax sales of light-duty pickup trucks (and parts sold on or with the truck). Section 4061(b)(1) *imposes* an 8% tax on a part or accessory for a truck if it is sold in a separate transaction. Finally, § 4061(b)(2) *exempts* from the 8% tax sales of parts and accessories suitable for use on a "passenger automobile." The code section does not provide a definition of the term "passenger automobile."

subject to the tax. The IRS assessed deficiencies for the period of the fourth quarter of 1975 through the second quarter of 1977. Luben paid the taxes for the fourth quarter of 1975 (approximately $1,000), but did not pay the taxes for the other quarters (approximately $70,000). This action to obtain a refund of the taxes and the Government's counterclaim for the unpaid taxes from the other quarters ensued.

While this suit was pending in the District Court, another District Court issued an interlocutory memorandum in *Bristol Corp., dba Fey Mfg. Corp. v. United States* [81-2 USTC ¶ 16,366], No. CV-78-1759 FW (C. D. Cal. May 22, 1980), *appeal docketed,* No. 82-5361 (9th Cir. April 19, 1982). *Bristol* involved the same question as is present here: whether sales of accessories for light duty pickup trucks sold after the sale of the trucks are exempt from the excise tax by the "passenger automobile" exemption. In the interlocutory memorandum, the District Court found that light-duty trucks are included within the meaning of "passenger automobiles," and ruled that sales of light-duty truck accessories were exempt. However, because the *Bristol* case involved a bifurcated trial, a second issue was not decided, and thus a final judgment was not entered until months after the decision was issued by the District Court in this case. *Bristol* is currently on appeal before this Circuit.

Following the issuance of the interlocutory memorandum in *Bristol,* Luben, in support of its motion for summary judgment, contended that the *Bristol* interlocutory memorandum collaterally estopped the Government from relitigating the question of whether light-duty pickup trucks are included within the passenger automobile tax exemption. The Government countered with the argument that the interlocutory memorandum did not raise a collateral estoppel and that as a matter of law light-duty pickups are not passenger automobiles.

Discussion

I. *Did the District Court err when it refused to give collateral estoppel effect to the Bristol interlocutory memorandum?* Luben was not a party in *Bristol*. However, the issue litigated in *Bristol*, the scope of the "passenger automobile" exemption under § 4061(b)(2), is identical to the issue involved here.

Collateral estoppel, also termed issue preclusion, generally applies when an issue finally decided in an earlier action is involved in a second action, and the parties involved in the second action are bound by the first decision.[2] Until a few years ago, the parties to the second action must have been parties to the first action, or have been subject to the binding effect or benefit of the first action. However, the Supreme Court has abandoned this traditional rule of mutuality. In *Parklane Hosiery Co. v. Shore*, 439 U. S. 322, 331-33 (1979), the Supreme Court stated that a defendant who has a full and fair opportunity to litigate an issue in one action may be precluded from defending itself on the same issue in another action brought by a different

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[2]Traditionally, collateral estoppel applied only to issues that involve determinations of fact, and did not apply to pure questions of law. See *United States v. Moser*, 266 U. S. 236, 242 (1944). The court in *Divine v. Commissioner* [74-2 USTC ¶ 9527], 500 F. 2d 1041, 1049-50 (2d Cir. 1974), followed this rule in holding that the IRS was not collaterally estopped from relitigating in the Second Circuit a question that it had lost on identical facts in the Seventh Circuit. The court in *Divine* pointed to the absurdity of the situation that would arise if a decision in one circuit, not reviewed by the Supreme Court on certiorari, could foreclose all other circuits from independently determining the merits of the issue. *Id.* at 1049.

*Divine* would not prevent the application of collateral estoppel in this case. In *Starker v. United States* [79-2 USTC ¶ 9541], 602 F. 2d 1341, 1348 n. 5 (9th Cir. 1979), we stated that "[t]o the extent that it survives *Parklane Hosiery v. Shore* . . ., we think *Divine* has no applicability to cases arising within the same circuit." Since both *Bristol* and the present case have arisen in this circuit, collateral estoppel may be applied if otherwise appropriate even though a pure question of law is involved.

party. However, the Supreme Court provided the District Court with broad discretion to deny the application of offensive collateral estoppel where "the application of offensive estoppel would be unfair to a defendant." *Id.* at 331.

The Government raises two objections to the application of collateral estoppel here. First, the Government argues that the *Bristol* interlocutory memorandum was not sufficiently final for collateral estoppel purposes. Second, the appellees contend that it would be unfair to apply collateral estoppel offensively against the Government in this case.

To be "final" for collateral estoppel purposes, a decision need not possess "finality" in the sense of 28 U. S. C. § 1291. A "final judgment" for purposes of collateral estoppel can be any prior adjudication of an issue in another action that is determined to be "sufficiently firm" to be accorded conclusive effect. *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F. 2d 990, 996 (7th Cir. 1979); Restatement (Second) of Judgments § 13 (1982). Comment "g" to § 13 of the Restatement discusses factors that are relevant to the determination of "firmness";

> [P]reclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, *that the decision was subject to appeal or was in fact reviewed on appeal*, are factors supporting the conclusion that the decision is final for purpose of preclusion.

(Emphasis supplied.)

The District Court in the present case stated that the *Bristol* interlocutory opinion should not be given preclusive effect because "[a]s an interlocutory order it is subject to free revision by the court on its own motion or on motion of any party at any time before judgment." Furthermore, although the *Bristol* opinion does not appear to be tentative,

it could not have been the subject of an appeal at the time the instant case was decided in the District Court. We are satisfied that the District Court acted well within its discretion in determining the *Bristol* memorandum was not sufficiently firm to give it collateral estoppel effect.

Moreover, we are convinced that the Government did not have a "full and fair opportunity to litigate" its claim because it could not appeal the interlocutory memorandum in *Bristol*. Thus, we conclude that the District Court did not abuse its discretion in rejecting the application of the doctrine of collateral estoppel against the Government on the issue.

II. *Does the excise tax exemption for "passenger automobile" accessories contained in § 4061(b)(2) include parts and accessories for light-duty pickup trucks?* Luben argues that we should reach the same result as the District Court reached in *Bristol:* that the passenger automobile tax exemption includes light-duty pickup truck parts. We reject the invitation as neither the language of the statute, the legislative history of the statutory section, the committee reports which discuss the section, nor the rules of statutory construction offer support for the argument.

The language of the statute does not shed much light on whether light-duty pickup truck parts are included in the passenger automobile parts exemption. Section 4061(a) first imposes a 10% tax on truck bodies (and parts sold in connection with the truck), and then specifically exempts light-duty pickup trucks (and parts sold in connection with the truck) from the tax. Section 4061(b) imposes an 8% tax on parts and accessories (sold subsequently to the sale of the truck) for items listed in subsection (a), and then exempts parts and accessories suitable for use on passenger automobiles from the 8% tax. The statute does not define the

term "passenger automobile." Thus, the statute by itself does not offer unambiguous support for Luben's position.

The history of § 4061 does support the Government's argument that light-duty pickups are not passenger automobiles for purposes of the § 4061(b)(2) exemption. Prior to 1965, Congress imposed an excise tax on all automobiles and trucks, as well as parts and accessories for both automobiles and trucks. In 1965, Congress narrowed the excise tax by phasing out the excise tax on automobiles and their parts. Subsection (a)(1) was amended to impose an excise tax on only truck bodies and their parts, while subsection (a)(2) phased out the tax on automobiles. Pub. L. No. 89-44, title II, § 201, 79 Stat. 136 (1965). Subsection (b)(1) was amended to impose an excise tax on parts and accessories for (a)(1) vehicles (*i.e.*, trucks), while subsection (b)(2) repealed the tax on parts and accessories for (a)(2) vehicles (*i.e.*, automobiles). 79 Stat. 137.

In 1971, Congress amended § 4061 to its present form. Subsection (a)(2) was amended to exempt from the (a)(1) excise tax light-duty pickup trucks and parts sold in connection with the truck. Pub. L. No. 92-178, title IV, 85 Stat. 530 (1971). Had Congress intended in 1971 to also exempt from excise taxes parts and accessories which were sold after the purchase of the pickup truck, Congress could have done so by leaving subsection (b)(2) untouched; the cross-reference in (b)(2) to (a)(2) vehicles would have exempted parts and accessories for light-duty pickup trucks (*i.e.*, (a)(2) vehicles). However, Congress did amend subsection (b)(2) by deleting the cross-reference to subsection (a)(2) vehicles and inserting "passenger automobiles." 85 Stat. 533. Thus, instead of exempting parts and accessories for (a)(2) vehicles (pickup trucks), Congress exempted from the tax parts and accessories for "passenger automobiles."

Congress' intent to continue the excise tax imposed on parts and accessories for light-duty pickup trucks was made

clear in the committee reports to the 1971 amendments. The reports state that although the 10% excise tax imposed by subsection (a) on light-duty trucks, and parts sold with the trucks, was being repealed, the 8% tax imposed by subsection (b) would continue on parts sold separately. S. Rep. No. 92-437, 92d Cong., 1st Sess. at 81, *reprinted in* 1971 Code Cong. & Ad. News 1825, 1987. Similar language is found in the House report. H. R. Rep. No. 92-533, 92d Cong., 1st Sess. at 52, *reprinted in* 1971 U.S. Code Cong. & Ad. News 1825, 1866. This language strongly suggests that Congress did not intend to exempt from the 8% excise tax parts and accessories for light-duty pickups sold subsequently to the sale of the truck.

Finally, the rules of statutory construction support a conclusion that light-duty pickups are not passenger automobiles with respect to the tax exemption for parts and accessories sold subsequently to the sale of the vehicle. The general rule for construing tax statutes is that any doubt in the application of the statute is to be resolved in favor of the taxpayer. However, where the taxpayer attempts to bring itself within a tax exemption, as Luben is attempting to do in this case, doubt is to be resolved in favor of the Government. *Bingler v. Johnson* [69-1 USTC ¶ 9348], 394 U.S. 741, 751-52 (1969); *Herren v. United States* [70-2 USTC ¶ 15,953], 317 F. Supp. 1198 (S. D. Tex. 1970), *aff'd*, [71-2 USTC ¶ 16,000], 443 F. 2d 1363 (5th Cir. 1971). See also Sutherland Stat. Const., § 66.09 (4th ed.). The taxpayer has the burden of proving that the exemption applies to its situation. Luben has failed to prove that light-duty pickup trucks are passenger automobiles for purposes of the tax exemption. It is clear, therefore, that the § 4061(b)(2) exemption does not include parts and accessories for light-duty pickup trucks.

III. *Was there a material issue of fact which should have precluded the District Court from granting the Government's motion for summary judgment?* Luben's final argument is that summary judgment was not appropriate because the District Court should have held a trial on the issue of whether elongated-cab pickups are "multi-purpose" vehicles and therefore exempt as passenger automobiles pursuant to an IRS Revenue Ruling.

The IRS has issued Revenue Rulings stating that vehicles such as the "Scout," the "Bronco," and the "Jeep" are passenger automobiles for purposes of the § 4061(b)(2) tax exemption. The IRS found that these types of vehicles were not contemplated by Congress when it amended (b)(2) to its current form, and that the vehicles are not trucks in a generic sense. The IRS then examined the features of the vehicles to determine whether they should be deemed trucks or passenger automobiles for the purposes of the tax exemption, and found that the vehicles are "hybrid," containing features of trucks and automobiles; the vehicles were "multipurpose." The agency ruled that these "hybrid" vehicles would be treated as passenger automobiles.

Luben's contention is that the District Court should hold a trial to determine if elongated-cab pickups are "multi-purpose." Such a determination is unnecessary. Unlike the "hybrid" vehicles, Congress did contemplate and specifically address light-duty pickup trucks, but chose not to include accessories for these pickups sold after the sale of the truck in the tax exemption. Neither the IRS nor the District Court could rule otherwise. Even if the District Court found that elongated-cab pickups are multipurpose vehicles, sales of accessories for the pickups could not be exempt from the excise tax. Therefore, the question of whether an elongated-cab pickup is multipurpose is not material.

The final judgment entered by the District Court on July 30, 1981 is affirmed.

AFFIRMED.

## § 4061. Imposition of tax.

*(a) Trucks, buses, tractors, etc.—*

*(1) Tax imposed.*—There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax of 10 percent of the price for which so sold, except that on and after October 1, 1984, the rate shall be 5 percent—

Automobile truck chassis.

Automobile truck bodies.

Automobile bus chassis.

Automobile bus bodies.

Truck and bus trailer and semitrailer chassis.

Truck and bus trailer and semitrailer bodies.

Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer.

A sale of an automobile truck, bus, truck, or bus trailer or semitrailer shall, for the purposes of this subsection, be considered to be a sale of a chassis and of a body enumerated in this subsection.

*(2) Exclusion for light-duty trucks, etc.*—The tax imposed by paragraph (1) shall not apply to a sale by the manufacturer, producer, or importer of the following articles suitable for use with a vehicle having a gross vehicle weight of 10,000 pounds or less (as determined under regulations prescribed by the Secretary)—

Automobile truck chassis.

Automobile truck bodies.

Automobile bus chassis.

Automobile bus bodies.

Truck trailer and semitrailer chassis and bodies, suitable for use with a trailer or semitrailer having a gross vehicle weight of 10,000 pounds or less (as so determined).

*(b) Parts and accessories.*—

(1) Except as provided in paragraph (2), there is hereby imposed upon parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a)(1) sold by the manufacturer, producer, or importer a tax equivalent to 8 percent of the price for which so sold, except that on and after October 1, 1984, the rate shall be 5 percent.

(2) No tax shall be imposed under this subsection upon any part or accessory which is suitable for use (and ordinarily is used) on or in connection with, or as a component part of, any chassis or body for a passenger automobile, any chassis or body for a trailer or semitrailer suitable for use in connection with a passenger automobile, or a house trailer.